Supreme Court of the United States

October Term, 1940

No. 243

J. D. COLLINS,

Petitioner,

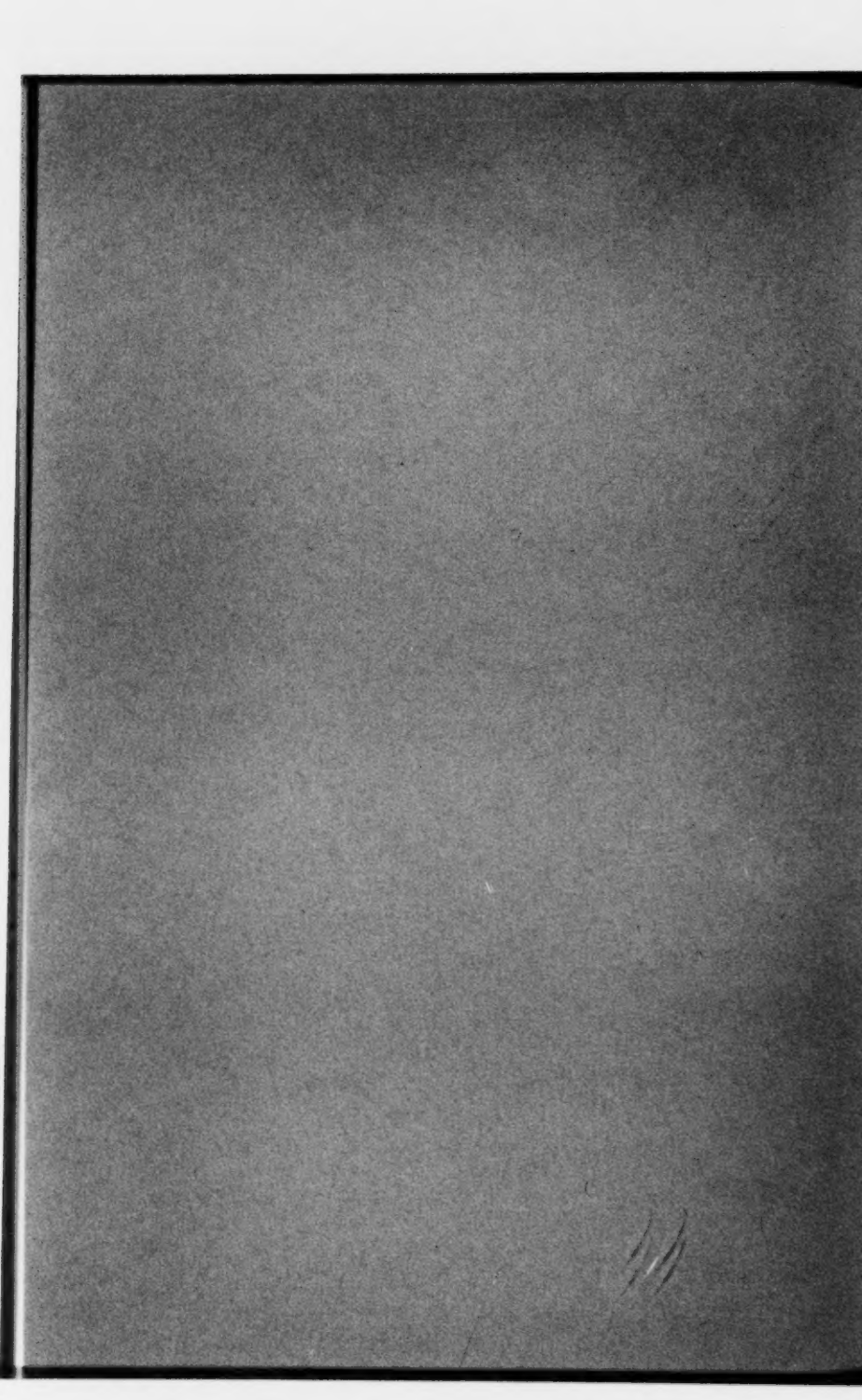
vs.

HATTIE E. MOSHER, [illegible]
Widow; HATTIE E. [illegible]
Trustee, [illegible]
LEON A. Widower; [illegible]
Widower; JOHN [illegible]
Tenant, KATIE F. YOUNG, [illegible]

BRIEF OF RESPONDENTS [illegible]
KATIE F. YOUNG [illegible]
CTION FOR WRIT [illegible]

[illegible]

Attorneys for Respondents,
E. SEEBERGER and
KATIE F. YOUNG.



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## October Term, 1940

No. .....

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Petitioner,

vs.

HATTIE L. MOSHER, Individually, a Widow; HATTIE L. MOSHER, as Trustee, a Widow; NIELSINE HERLICK, a Widow; L. SKREHOT, a Widower; JOHN J. HANLON, as Tenant; KATIE F. YOUNG, a Widow,

Respondents.

## BRIEF OF RESPONDENTS, L. SKREHOT AND KATIE F. YOUNG, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. L. GUST,
FRED W. ROSENFELD,
Professional Bldg., Phoenix, Arizona.
Attorneys for Respondents,
L. SKREHOT and
KATIE F. YOUNG.

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## OPINIONS DELIVERED

The trial court wrote no opinion.

The opinion of the Circuit Court of Appeals is officially reported in 115 Fed. 2d) 900, and is printed in the Transcript of Record, pages 36-42.

## JURISDICTION OF SUPREME COURT

It is admitted that this court has jurisdiction of this case on certiorari. It is submitted, however, that no ground for review is presented under Subdivision 5 of Rule 38 of this court.

## STATEMENT OF CASE

This is a suit to quiet title to a tract of real estate in Phoenix, Arizona, by the plaintiff a resident of Oregon against the defendants, residents of Arizona.

Plaintiff claims, as the grantee of Frances Lount daughter of William B. Lount, deceased. The claim of Frances Lount is made through the will of Julia A. Lount, mother of William B. Lount and defendant, Hattie L. Mosher. Said will, pages 9-14, Transcript of Record, purported to devise to said William B. Lount and Hattie L. Mosher the property in question, in trust, to satisfy certain specific bequests, one of which was to provide a wedding trousseau to the said Frances Lount grantor of the plaintiff, and disposed of the residue of the estate by distribution of all the rents, issues and profits and the proceeds of any sale or sales of real estate to said Trustees.

Plaintiff claims that this will vested in said Trustees a life estate only, suspending the remainder in fee of each Trustee's portion until his death, when, it is alleged, the remainder in fee for that portion, vested in the heirs of the testatrix, Julia A. Lount.

The Circuit Court of Appeals affirming the decision of the trial court held:

(1) That the will by devising absolutely to the Trustees, the rents, issues and profits, the absolute power of sale and absolute right to the proceeds of sale, vested a fee simple title in the Trustees after the specific legacies had been paid, and

(2) That if petitioner's contention that the will created a trust were accepted, the result would be that the remainder in fee vested immediately upon the testatrix's death in her heirs—said heirs being the same persons as the Trustees and in either event, these respondents, claimants under conveyance from said William B. Lount and Hattie L. Mosher, would have good title to the property.

## ARGUMENT

Petitioner sets up two reasons for allowance of Writ of Certiorari by this court. (Pages 6-9 of Petition for Writ and Brief) These are:

1. That the Circuit Court of Appeals decided an important question of local law in conflict with applicable local decisions, and

(2) That a part of the opinion of the Circuit Court of Appeals of the Ninth Circuit in this case is contrary to a decision of the Circuit Court of Appeals of the Fifth Circuit.

The first reason is not sustained.

The two cases: In Re Sears Estate, 54 Ariz. 52; 91 Pac. (2d) 874, and

Smith v. Teel, 35 Ariz. 274; 276 Pac. 850, cited on page 7 of Petitioner's Petition and Brief, are both cases construing wills bequeathing property to testator's widow for life, remainder to testator's children in fee, with broad, but not absolute powers of sale granted to the widow.

In each of those cases the question of whether the will conveyed a fee simple estate to the widow was not presented or discussed by the court. The controversy in each of those cases was the extent of the widow's power, and in each case the court held the power had not been exceeded by the acts of the widow. There was no occasion to consider whether the widow's life estate was extended to a fee simple by the power of sale.

Petitioner also makes reference to Section 4232 Revised Statutes of Arizona, 1901, a copy of which is set forth on page 15 of the Petition and Brief.

No interpretation has ever been placed upon that Section by the courts of Arizona with reference to the questions here involved.

Petitioner's contention to the effect that the Circuit Court of Appeals rendered a decision at variance with the local law of Arizona, is not sustained. Petitioner had previously made the same contention with respect to the same trust in a prior case in which the Circuit Court of Appeals of the Ninth Circuit determined that the trust terminated when the specific bequests were paid.

Collins v. Mosher, 91 Fed. (2d) 582-584.

When Petitioner filed this case he, therefore, was familiar with the views of the Circuit Court of Appeals on this question. Notwithstanding this knowledge he again elected the jurisdiction of the Federal Court instead of going to the state court; presumably because he was fearful that the state court would not decide in his favor.

It is certainly going a long way for the petitioner to ask this court to hold that a prior decision of the Circuit Court of Appeals is at variance with the decisions of the Supreme Court of Arizona when he had the opportunity to go directly to the last named court to establish the contention which he is now making before this court.

Reference to the opinion in:

Collins v. Mosher, 91 Fed. (2d) 582, 584, and the opinion in this case, 115 Fed. (2d) 900, discloses the fact that two District Court Judges and four Circuit Court of Appeal Judges have unanimously rejected the construction which plaintiff places upon the Arizona law. The two District Judges, of course, were

Arizona lawyers, and the four Circuit Court of Appeals Judges are presumably not wholly unfamiliar with Arizona law.

It is presuming a great deal for Petitioner to come to this court saying that the Arizona law has been misinterpreted in this case.

The second reason advanced by Petitioner is wholly without merit since the question to be decided is wholly one of the local law of Arizona.

Tompkins v. Erie, 304 U. S. 64; 58 S. Ct. 817; 82 Law Ed. 1188.

A decision of the Circuit Court of Appeals of the Ninth Circuit construing Arizona law cannot be in conflict with a decision of the Circuit Court of Appeals of the Fifth Circuit construing the law of Texas.

Vellacott v. Murphy, 16 Fed. (2d) 700.

**ON THE MERITS**

The decision of the Circuit Court of Appeals was plainly right upon both grounds stated in the opinion. Where a devise, though stated to be made in trust, grants to the devises the unrestricted right to rents, issues and profits and to manage, control and sell and use the proceeds without restriction, such devise clearly passes the fee simple estate, and also, where a devise is made for life without disposing of the remainder in fee, said remainder necessarily vests in the testator's heirs immediately upon his decease. The contention

that it remains suspended until the life tenants death, violates a fundamental rule of the common law.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents,

L. SKREHOT, and
KATIE F. YOUNG.